91-979

(2)

FILED
NOV 12 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. _____

ROBERT THOMAS LARSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,	2nd Crim. No. B046345
	Super.Ct. No.CR15062
Plaintiff	San Luis Obispo County
and	
Respondent,	COURT OF APPEAL
	DISTRICT
v.	
	F I L E D
ROBERT THOMAS	
LARSON	May 2, 1991
Defendant	Robert Wandruff, Clerk
and	Deputy
Appellant.	

In a fourth trial, Robert Thomas Larson was convicted by jury of two counts of misdemeanor vehicular manslaughter. (Pen. Code, § 192c, subd.

(2)[1]/, lessor offenses to those charged.) Probation was granted on condition he serve two consecutive 90 day terms in the county jail.

He contends: "I The trial court erred in allowing this case to be tried for an unprecedented fourth time after three hung jury mistrials." "II The trial court committed reversible error in allowing the prosecutor to read the prior testimony of the defendant to the jury as part of his case in chief." "III It was reversible error to allow expert testimony without an adequate foundation." "IV Prejudicial misconduct by the jury requires reversal." "V The evidence was insufficient to support the verdict." "VI The court erred by admitting evidence over objection."

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[1]/ All further statutory references are to this code unless otherwise specified.

"VIII The prosecutor committed repeated misconduct which requires reversal." As no prejudicial error occurred, we affirm.

Appellate was originally charged with two felony counts of driving under the influence causing death (§ 192c, subd. (3)) and one count of driving under the influence causing injury. (Veh. Code. § 23153(a).) The charges arose from the August 9, 1987 "head-on" freeway collision of the vehicle driven south bound by appellant with a northbound vehicle. At approximately 4 p.m. appellant's van left the southbound lanes of the freeway, traveled through the ice-plant landscaped center-divider and struck a car traveling in the northbound lane. The driver and one passenger in that vehicle were killed and another passenger and appellant was seriously injured. A blood alcohol test of

appellant's blood indicated he had a .07 level at 6:45 p.m. An earlier drawn blood sample for hospital purposes showed a .10 percent level at 5:15 p.m. There was expert opinion appellant was under the influence of alcohol at the time of the collision.

In the first trial appellant was convicted of the two felony counts of driving under the influence causing death and the jury was unable to agree on a verdict on the Vehicle Code section 23153, subdivision (a) charge. Appellant successfully moved the court to declare a mistrial and vacated the verdicts on the theory that the jury had misunderstood the instructions requiring proof of alcohol impairment. The case was tried a second and third time, but the jury was

unable to reach unanimous verdicts.[2]/

Prior to the instant trial, appellant unsuccessfully moved to have the case dismissed on the grounds, inter alia, that a fourth trial on the same charges would violate the due process clause of the California and United States Constitutions. (Cal. Const., art. 1, § 7; U.S. Const., 6th & 14th Amends.)

Appellant concedes the former jeopardy clauses provide no bases to prevent a retrial. When a jury is unable to reach a verdict a retrial does not violate the former jeopardy clause. (Richardson vs. United States (1984) 468

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[2]/ The procedural history is taken from facts conceded to be true contained in appellant's motion to dismiss. The record on appeal contains only the clerk's and reporter's transcripts for the instant trial. We do not accept counsel's hearsay statements regarding the number of jurors voting for guilt or acquittal as they are unsupported by any record and were challenged below.

U.S. 317 [104 S.Ct. 3081, 82 L.Ed.2d 242]; People vs. Williams (1987) 195 Cal.App.3d 398, 407.) All three cases relied on by appellant hold that the various trial courts have inherent authority to dismiss a case after successive juries have been unable to reach a verdict. (State of Hawaii vs. Moriwake (1982) 65 Hawaii 47 [647 P.2d 705]; State of Tennessee vs. Witt (1978) 572 S.W.2d 913; United States vs. Ingram (1976) 412 F.Supp. 384.)

That same discretion to dismiss a criminal case is provided by statute in section 1385 which, in pertinent part provides: "(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set

forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading."

In exercising this discretion the court must consider the interests of society as well as those of the defendant. (People vs. Orin (1975) 13 Cal.3d 937, 945-947.) In People vs. Williams (1981) 30 Cal.3d 470, at page 481 the Supreme Court reiterated the criteria for a proper exercise of discretion under this section in determining whether to dismiss a case rather than to permit a retrial. It held the court must consider the weight of the evidence of guilt, the nature of the crime, whether the defendant is incarcerated during the trial process, the burden of retrial upon the defendant, the likelihood additional evidence will

be presented, and the risk the defendant will escape a proper punishment. (Id.)

In a well-reasoned written decision the trial court here applied those criteria and declined to dismiss. Appellant has failed to demonstrate an abuse of discretion as a matter of law. (See People v.s Jordan (1986) 42 Cal.3d 308, 316) Assuming arguendo that some number of retrials where the prosecution was unable to convince a unanimous jury of the guilt of the accused could constitution a violation of the traditional notions of fair play which underlie the due process clauses, this is not the case.

There was substantial evidence that appellant committed a criminal offense by driving his automobile over the center-divider and into the northbound lanes. Blood tests indicated his alcohol content

was high enough to impair his driving ability. The crimes with which he was charged were serious involving the death of two people and the serious injury to a third. Three is great public concern about the serious risks posed by the drinking driver. (Burg vs. Municipal Court (1983) 35 Cal.3d 257, 263.) Appellant was not incarcerated prior to and during the trials.

Based on the prosecution's opposition to the motion to the motion to dismiss the trial court reasonable concluded additional evidence would be presented on the issue of appellant's guilt. Some of the evidence related to appellant's eating and alcohol consumption prior to the accident bearing on his blood alcohol content at the time of the accident.

The trial court considered the

expense of time, worry, and attorneys fees resulting from the retrial to appellant. Balancing all factors, the trial court indicated: "In this case the balance between the interest of society and that of the defendant falls clearly in favor of society."

Appellant's claim the court erred in permitting the prosecution to use some of appellant's statements during testimony in earlier trials in its case in chief lacks merit. Appellant does not specify the statements he claims were error to admit but challenges instead the admission during the prosecution's case in chief of any statements made by him at earlier trials on the ground it denies him due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the California Constitution.

Appellant cites no authority, nor have we found any, which precludes the People from using a statement made by the accused during a former trial simply because it was testimony in the defense portion of the case.[3]/ Appellant's statements were party admissions and the context in which they were made was necessary for the jury's understanding of them. (Evid. Code, §1220, 356; People vs. Barrick (1982) 33 Cal.3d 115, 131.)

Appellant's claim that the court erred in permitting Gordon Jennings to testify as an expert on accident reconstruction is also without merit. Jennings opined there was not evidence

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[3]/ Appellant relies on Larios vs. Superior Court 91979) 24 CAl.3d 324 and Prudhomme vs. Superior Court (1970) 2 Cal.3d 320. Larios involved a claim of former jeopardy. Prudhomme disallowed a pretrial order for discovery from the defense to the prosecution. Eight applies here.

that a side-to-side collision between appellant's van and a motor home next to him in the slow lane caused appellant to leave the southbound lanes and collide with the decedents' vehicle. Appellant did not specifically object on this ground below which is waived on appeal. (Evid.Code, § 353.) Appellant's objection below was of no "adequate foundation" for Jennings' opinion regarding the cause of the flat tire on appellant's van found after the collision. Appellant also objected that Jennings had never studied driver's reactions to rear end collisions specifically to permit him to render an opinion on that. Assuming arguendo these objections were sufficient to apprise the court of the present objection, there was no error.

Evidence Code section 720 provides in pertinent part: "(a) A person is

qualified to testify as an expert if he has special knowledge, skill, experience, training, or eduction sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, with special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert."

A trial judge has broad discretion in determining whether to permit a witness to testify as an expert. A ruling permitting such testimony will not be disturbed on appeal unless it clearly constitutes and abuse of discretion. (People vs. Bloyd (1978) 43 Cal.3d 333, 357.) A court abuses its discretion when it rules "in an arbitrary, capricious or patently absorb manner that results in a manifest miscarriage of justice." (People vs. Jordan, supra, 42 Cal.3d at

p. 316.)

Jennings testified that accident reconstruction had been his principal occupation during the previous twelve years. He had qualified as an expert in court three or four times a year during the previous fifteen years and had reconstructed thousands of accidents. He was a member of the Society of Automotive Engineers and had acted as a consultant to the University of Southern California's Institute of Safety. In addition he had taken courses from Northwestern University on the subject, taught classes on the subject, and done independent reading on the subject. He had been a test driver, driven in races, and participated in crash testing to determine how cars react to sideswiping. He had sufficient knowledge and experience to opine whether the accident

had been caused by appellant's van being sideswiped by a vehicle in the inside lane. Furthermore, other witnesses testified the minor dents and marks on the passenger side of appellant's vehicle were caused by driving through trees and brush from which the jury could conclude no contact was made between the motor home and appellant's van. In fact appellant testified and never claimed the motor home actually struck his vehicle.

The basis for appellant's claim of juror misconduct requiring reversal is that juror Paul Burchette failed to disclose to the court and counsel his prior service on driving under the influence cases 30 years earlier while disclosing to other jurors during deliberations that he had such experience and based thereon believed appellant was under the influence of alcohol.

As hearing was held wherein the court found Burchette had failed to disclose this service in response to a general question to the panel as a whole. The court found no prejudice to appellant as Burchette's statements were the kind of common "street information" that persons charged with driving under the influence claim to have had only one or two beers. The court noted appellant was acquitted of driving under the influence and found the misconduct harmless beyond a reasonable doubt. So do we.

The "[i] intentional concealment of relevant facts or the giving of false answered by a juror during voir dire examination constitutes misconduct. [Citation.]" (People vs. Blackwell (1987) 191 Cal.App.3d 925, 929.) However, appellant has failed to show prejudice as a result of this misconduct.

"A judgment adverse to a defendant in a criminal case must be reversed or vacated "wherever

. . . there is a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury." [Citations.]" People vs. Marshall (1990) 50 Cal.3d 907, 950-951; see also People vs. Holloway 50 Cal.3d 1098, 1108-1112.) The acquittal of appellant on the alcohol related offense demonstrates lack of prejudice.

Appellant claims the conversation during trial between Officer Merrill, a prosecution witness, and one alternate and one juror and the opening of doors for jurors by the father of one of the

victims constituted prejudicial misconduct. Assuming arguendo the conduct violated the court's no-contact rules between jurors and trial participants, the record demonstrates no prejudice resulted therefrom.

The court conducted prompt inquiry in each instance and separately questioned the participants. The officer and the jurors all stated the conversation was a purely social one regarding jurors chairs, the courtroom location and whether the officer was exempt from jury duty. The jurors stated it would not affect the assessment of the officer's testimony. The alternate juror did not serve. The father of one of the victims stated he had only once held the doors for any jury and there was no showing any juror knew who he was. We concur with the court's determination

there was no possibility appellant was prejudiced in either instance.

Appellant's insufficiency of the evidence contention is also without merit. We view the entire record to "determine whether the evidence is such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citation.]" (People vs. Bean (1988) 46 Cal.3d 919, 932.) There was evidence from which the jury could reasonably infer the cause of the collision.

Penal Code Section 192c, subdivision (2), in pertinent part, defense manslaughter as the unlawful killing of a human being by ". . . driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence." Here appellant veered gradually in a

straight line through the planted center-divider into the northbound lanes and struck the victim's car. There were no signs the brakes were ever applied.

Ms. Sadowski, who helped appellant from his van after the collision, said he stated he was very tired, a complaint he reiterated to an emergency room physician. It was uncontested that appellant, then 70 years old, had been hunting for 3 days prior to the accident. One of his hunting companions said he had fallen asleep after returning from hunting earlier in the day of the collision.

Appellant admitted drinking two or three beers which an expert opined could make a person feel sleepy. Unanimous expert opinion ruled out any tire blowout prior to the collision. Appellant himself said only that he heard a muffled

bang before the van left the southbound lanes. As indicated, Jennings opined that appellant's vehicle was not struck by another vehicle. From the evidence a reasonable jury could conclude appellant, knowing he was tired, drove his van, fell asleep and did not wake up until the collision occurred. This is a substantial evidentiary basis to sustain the convictions. (People v. DeSpenza (1962) 203 Cal.App.2d 283, 287-291.) Appellant's reliance on contradictory evidence is an inappropriate invitation to reweigh the evidence.

We do not address appellant's claims regarding the erroneous admission of evidence over his objection. He claims: "VI B. The transcript of the conditional examination of nurse Nurse was erroneously admitted without a showing of an attempt to effectuate service of

process, C. the court erred in admitting the results of a blood test using the Abbott TDX machine, D. the court improperly allowed statements of the defendant to be admitted which were obtained in violation of Miranda." Contentions (B) and (C) are not addressed because both relate to one of the blood alcohol tests done on the defendant and his acquittal of all charges relating to driving under the influence precludes any prejudice from the rulings even if erroneous. (People v. Watson (1956) 46 Cal.2d 818.)

We do not address appellant's contention that the questioning of appellant at the hospital after the collision but before his arrest by California Highway Patrol Officer Shelby violated his rights under Miranda v. Arizona (1966) 384 U.S. 486 [16 L.Ed.2d

694]. Even assuming appellant's in limine motion to exclude the testimony regarding his statement about his speed and his alcohol consumption without further objection during trial is sufficient to preserve the issue on appeal (but see People v. Boyer (1989) 48 Cal.3d 247, 270, fn. 13), appellate review. The motion in limine was made based on Shelby's testimony at the third trial. That has therefore waived the claim of error. (In re Kathy P. (1979) 25 Cal.3d 91, 102.)

We note the statements challenged were, at best, admissions. They were cumulative of other evidence including appellant's own testimony. They relate primarily to the alcohol related offense of which he was acquitted. Any assumed error would be harmless beyond a reasonable doubt. (People v. McClary

(1977) 20 Cal.3d 218, 230; People v. Boyer, supra, 48 Cal.3d at pp. 279-280, fn. 23.)

Appellant's final contentions regard claims of prosecutorial misconduct. Most are inadequately raised in the brief in a conclusory fashion by simply referring to pages of the transcript to questions asked by the prosecutor or to his arguments to the jury. It is impossible to determine in these instances what appellant claims is improper about these remarks and what prejudice arose therefrom. These claims of error are deemed to be waived. (People v. Collegri (1984) 154 Cal.App.3d 856, 865; People v. Dougherty (1982) 138 Cal.App.3d 278, 282.)

On several occasions complained of, appellant failed to object. All of the statements and questions apparently

complained of are of the type which an objection and admonition would cure and are therefore waived by a failure to object below. People v. Green (1980) 27 Cal.3d 1, 27-34.)

To the extent cognizable on appeal we find the prosecutor's actions either were no improper or resulted in no prejudicial error. The reference to the photograph, exhibit 16, was to admitted evidence. The question to appellant regarding what he had done on the Friday before the collision did violate the court's ruling precluding evidence of appellant's activities before 4:00 a.m. on the day of the offense. However, no prejudicial response was received. The question was designed simply to sho appellant had commenced his hunting trip that day, which was in evidence from other witnesses.

Appellant's claim that the prosecutor referred to facts outside the record relate to the testimony of Sydney Hoffman, an expert who testified for the defense in the third trial but not in the fourth one. To those references to which he never objected, his claim is waived. (People v. Ghent (1987) 43 Cal.3d 739, 762.) The fact and substance of that testimony was in evidence, however, because appellant's counsel had questioned Mr. Jennings about whether he was aware of Hoffman's testimony about the dents in appellant's car and Hoffman's opinion that a motor home had sideswiped appellant's van. Jennings responded affirmatively. The court informed the jury it was their duty to determine which facts were true and instructed them that statements of counsel were not evidence. (See CALJIC

1.02.) No possible prejudice could have flowed from this exchange.

Appellant is correct that the prosecutor stated his personal belief in certain facts and in appellants's guilt. Appellant objected on all but one occasion. It is well established that it is misconduct for the prosecutor to state his or her personal belief in the guilt of the accused. (People v. Bain (1971) 5 Cal.3d 839, 847.) The danger of such improper references is " 'where there is substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other then evidence adduced at trial.' [Citation.]" (People v. Adcox (1988) 47 Cal.3d 207, 236.)

Here, However, at each place in the transcript referred to by appellant the prosecutor linked his statement of belief

to evidence adduced at trial. The prosecutor apologized for the use of the term "I" and explained to the jury his intent was merely to sho them which evidence should convince them of appellant's guilt of the charged offenses. No reasonable juror could conclude that suppressed evidence was the basis of the belief to appellant's prejudice.

The prosecutor's argument that, "It is your job to take the words and the definition of 'impairment,' the expectations of society, and apply them to these facts" does not constitute an appeal to passion and prejudice. It is the duty of jurors to apply the law to facts adduced at trial to determine whether the accused is guilty of an offense.

The judgement is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

STONE, P. J.

GILBERT, J.

William R. Fredman, Judge

Superior Court County of San Luis Obispo

Robert M. Sanger, for Defendant and Appellant.

John Van de Kamp, Attorney General; Richard B. Iglehart, Chief Assistant Attorney General; Edward T. Fogel, Jr., Senior Assistant Attorney General; Keith H. Borjon, Supervising Deputy Attorney General; Donlad E. De Nicola, Deputy Attorney General, for Plaintiff and Respondent.

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SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 6

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233 East Carrillo Street, Suite C
Santa Barbara, California 93101

Re: The People of the State
VS.
Larson, Robert Thomas

2 Criminal B046345
San Luis Obispo No. 15062

APPENDIX B

SUPREME COURT
F I L E D
JUL 12 1991
Robert Wandruff Clerk
Deputy

Second Appellate District, Division Six,
No. BO46345
So21512

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, RESPONDENT

v.

ROBERT THOMAS LARSON, APPELLANT

The time for granting or denying review in the above cause is hereby extended to and including September 12, 1991, or the date upon which review is either granted or denied.

Chief Justice

APPENDIX C

Second Appellate District, Division Six,
NO.Bo46345
SO21512

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE, Respondent

v.

ROBERT THOMAS LARSON, APPELLANT

SUPREME COURT
F I L E D
AUG 14 1991
Robert Wandruff Clerk

Appellant's petition for review Denied.

LUCAS

Chief Justice